Supreme Court, U.S.
APR 13 1993

No. 92-1405

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ELENA RUTH SASSOWER and DORIS L. SASSOWER,

Petitioners,

v.

KATHERINE M. FIELD, CURT HAEDKE, LILLY HOBBY, WILLIAM IOLONARDI, JOANNE IOLONARDI, ROBERT RIFKIN, individually, and as Members of the Board of Directors of 16 Lake Street Owners, Inc., HALE APARTMENTS, DeSISTO MANAGEMENT, INC., 16 LAKE STREET OWNERS, INC., ROGER ESPOSITO, individually, and as an officer of 16 Lake Street Owners, Inc.

Respondents,

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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Respondents Have Failed To Meet The Issues Or To Controvert The Essential Facts Establishing Such Issues

Respondents' Opposing Brief is more significant for what it does not say than what it does. Respondents do not address any of the four "Questions Presented" by the Petition. Nor do they dispute Petitioners' showing that Chambers v. Nasco, 111 S. Ct. 2123 (1991)--the only authority on which the Second Circuit relied--is legally and factually inapplicable.

Respondents have not rebutted Petitioners' legally-supported arguments that Chambers, unlike the case at bar:

> (a) did not involve a case brought under a federal fee-shifting statute, such as the Fair Housing Act, and, therefore, did not raise the question of congressional preemption of inherent sanctioning power [Question #1, Point I];
>
> (b) did not involve inherent power being used as a back-up to sustain a district court's otherwise unsustainable sanction awards under Rule 11 and §1927 [Question #2, Point II]
>
> (c) did not involve a due process challenge to inherent power in the lower courts, including denial of the right to a hearing and entitlement to a jury trial [Question #3, Point III];
>
> (d) did not involve equitable considerations of "unjust enrichment" and "unclean hands", precluding a fee-shifting award under equitable inherent power [Question #4, Points IV and V].

Nor have Respondents addressed Petitioners' "Reasons for Granting the Writ" (Pet., at 14-16), articulating the compelling constitutional and public policy considerations warranting review by this Court--reasons far transcending the parties to this litigation.

Respondents do not dispute that the Second Circuit's decision uses a "standardless" inherent power to override and nullify congressional intent and the constitutional balance of powers, as reflected in text-based statutes and rules. The fact that the Second Circuit rests on Chambers--without the slightest discussion of its applicability to the instant case--and that Respondents, likewise, have not come forth with any facts bringing this case within Chambers' defined parameters shows that Chambers is being interpreted to permit broad expansion of inherent power far beyond the narrow and extreme circumstances of that case. Such application of Chambers, if allowed to stand, permits lower federal courts, in one fell swoop, to undo the work of a democratically-elected Congress, as well as a duly-appointed Judicial Conference--and to do so, even without passing respect to bedrock due process principles.

This case presents the perfect vehicle for this Court's vitally-needed clarification of Chambers--a need further borne out by a second case wherein certiorari is being sought, Pacific Legal Foundation v. Paul Kayfetz, et al., now pending before this Court under docket number 92-1544. In Pacific Legal, the Ninth Circuit relied on Chambers to disregard available statutory and rule sanctioning provisions and, in the absence of "necessity", used inherent power to sanction a non-party, public interest foundation. In the instant case, the Second Circuit similarly departed from "the rule of necessity" in its use of inherent power--failing even to identify *any* instance of sanctionable conduct by Petitioners which would require inherent power to address. Such fact, evident from the very face of the Second Circuit's decision, is undisputed by Respondents--who, likewise, fail in their Opposing Brief to show *any* conduct by Petitioners outside the reach of available sanctioning provisions.

A reading of the decisions in Pacific Legal and this case suggests that inherent power is not being used to punish otherwise unpunishable conduct, but rather is being employed to target those who the lower courts desire to make the object of sanctions. Taken separately and together, these two cases display the ease with which inherent power becomes a sword to selectively and invidiously punish persons or entities associated with causes to which the court is unsympathetic, if not hostile, rather than a shield to protect the integrity of the court.

Thus is graphically illustrated the precise situation forecast in Justice Kennedy's eloquent dissent to Chambers, in which Chief Justice Rehnquist and Justice Souter joined:

> "But the same unchecked power also can be applied to chill the advocacy of litigants attempting to vindicate all other important federal rights." supra, at 2145.

As stated in Petitioners' pending motion to have the case at bar considered with Pacific Legal, both cases, taken together, represent the gamut of private enforcement of federal rights: by private individuals, as in the instant case, and by public interest groups, as in Pacific Legal. In each case, the plaintiffs were acting as "private attorney-generals", seeking to further declared national policy, as expressed in congressional enactments. The inevitable effect of the Second Circuit and Ninth Circuit decisions for which review is sought is to discourage private parties from bringing civil rights and other public interest litigation.

The significance of Justice Kennedy's concern as to the potentially "chilling effect" of Chambers was recognized by the majority of this Court which, nonetheless, believed that the risk was minimal because the subjective "bad-faith" component was "difficult to establish" (supra, at 2134, fn. 11). As an additional safeguard, the majority observed that due process mandates would "of course" have to be met in making a "bad-faith" finding, as well as in the assessment of fees (supra, at 2136).

Yet, both the instant case and Pacific Legal bear out the legitimacy of Justice Kennedy's fear that the predicate "bad-faith" finding would, without greater definition, become nothing more than a "talismanic recitation of the phrase"[1]. Thus, in the case at bar, there is not a shred of evidence in the record to support the "talismanic recitation" of "bad-faith" by the District Court (CA-38), thereafter adopted in the

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[1] See also 105 Harvard Law Review 357 (1991), noting in its discussion of Chambers that "the due process requirement of a finding of 'bad faith' is poorly defined at present...".

most cursory fashion by the Second Circuit (CA-17)--without the slightest concern for the palpable lack of due process underlying such "recitation"[2]. Indeed, the utter irrelevance of "bad faith" to the Second Circuit's invocation of inherent power is highlighted by the cavalier manner in which the Second Circuit transposed the $50,000 Rule 11 award--as to which the District Court had failed to identify a single offending document--into a $50,000 award under inherent power, albeit Rule 11 awards do not require "bad faith"[3] (CA-14, 16-17). Likewise, the Second Circuit simply ignored the fact that there was no finding of "bad-faith" against non-lawyer Elena Sassower--let alone any identification of sanctionable conduct by her--when it converted an undefined portion of the $42,000 sanction imposed against her by the District Court under §1927 into one under inherent power (CA-14-17) (Pet., at 20-21).

The foregoing exercise of inherent power against Petitioners must be seen in the context of a case which the Second Circuit expressly found not to be "meritless" when it rejected the District Court's fee award under the Fair Housing Act (CA-13-14). Indeed, the Second Circuit went even further by explicitly ruling that there was no finding that Petitioners' case had been brought or maintained in bad-faith. As a consequence, any sanctionable conduct by Petitioners had to be

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[2] Exemplifying the deprivation of due process by the District Court is its incorporation of a substantial segment of its April 19, 1990 memorandum decision (CA-39-40), which was not the end-product of any due process procedure--the magistrate having sua sponte issued a false and defamatory decision against Doris Sassower, affording her no prior notice or opportunity to be heard as to her documented medical condition. On its face, the incorporated memorandum decision demonstrates the District Court's assumptions, speculations, prejudgments, and reliance on rank hearsay, including newspaper articles, as well as its summary rejection of Doris Sassower's request for a hearing on the allegations contained in the magistrate's report--all of which she vigorously denied. (see excerpt from the Petition for Rehearing, annexed hereto; also Br. 33-39)

[3] Notwithstanding that Rule 11 is judged by an objective standard, without regard to subjective intent, stringent standards of specificity and due process apply. In Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533 (1991), two evidentiary hearings were held by the magistrate, with a third thereafter held in a case involving a Rule 11 award of less than $14,000 assessed against a corporation.

determined with respect to the specific acts involved--not as a totality.

Respondents Do Not Deny That The Award Under Inherent Power Masks Substantive Fee-Shifting

As set forth in the Petition (at 16-19), the Second Circuit's internally inconsistent decision shows that what was actually achieved through inherent power was a sub silentio repudiation of the American Rule against fee-shifting and a judicial interference with the substantive social policy reflected in the fee-shifting statute involved, as limited by this Court's interpretation in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

Respondents totally ignore the irrefutable fact--documented by the very Judgment (CA-20) affirmed by the Second Circuit (CA-20)--that the fee-shifting sustained by the Second Circuit was actually the substantive fee-shifting of the Fair Housing Act--the various Respondents receiving the District Court's Fair Housing Act distributive allocations, rather than the differing amounts allotted them under its Rule 11 and §1927 awards (Pet., at 9, fn. 7, 19). Nor do Respondents challenge Petitioners' argument that once the Second Circuit vacated the District Court's Fair Housing Act awards, the Judgment based thereon became a nullity (Pet., at 19 fn. 14).

Respondents Have Not Shown Compliance With Due Process

Respondents' attempt to argue that the Second Circuit's decision is in keeping with the mandates of due process, recognized by Chambers, demonstrates that such mandates need to be more clearly defined[4]. Respondents' affirmative statement that: "...there is absolutely no merit to plaintiffs' unsubstantiated allegations of lack of due process" (at p.

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[4] The need for clarification of the due process aspects of inherent power is further evident from Western Systems v. Ulloa, 958 F.2d 864 (9th Cir. 1992) one of the two cases relying on Chambers, cited by Respondents in their Opposing Brief. In that case, the Ninth Circuit was compelled to remand a sanctions award made under inherent power because the district court did not hold an "appropriate hearing" and provide a "proper opportunity...to contest the questions of bad faith and the amount of the sanctions." supra, at 873. See also footnote 1 hereinabove.

13) is indefensible where: (a) Respondents admit that their motions for counsel fee/sanctions were not made under inherent power (at p. 4); (b) the Second Circuit's decision, on its face, fails to identify what is being sanctioned under inherent power; (c) Respondents admit that no hearing was afforded Petitioners[5].

Respondents do not deny that the monetary awards identified under Rule 11 and §1927 were *not* correlated by the District Court to any particular defense costs and were arbitrarily arrived at lump sums (CA-52-53), fixed in the identical aggregate amount as the equally arbitrary award under the Fair Housing Act (CA-50-52). As is obvious from the face of its decision, the Second Circuit adopted, without question, such completely arbitrary and uncorrelated sums (CA-14-18) for the award under inherent power.

Respondents have carefully framed their opposing arguments (at pp. 10-11) so as to repeat in haec verba the conclusory language of the District Court, adopted virtually verbatim by the Second Circuit's decision. Such artifice on their part is designed to avoid any direct statement by them as to what the factual record actually shows--as opposed to what the lower courts say that it shows[6].

Thus, for example, Respondents' reference to Petitioners' bias recusal motions is couched in the language of the Court's opinion as "unsupported" (p. 10). Yet, Respondents do not themselves assert that

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[5] Respondents' claim (at p. 13) that no hearing was necessary because "all sanctioned conduct was within the proceedings of the District Court" calls for an unequivocal statement by this Court that a hearing is required to determine "bad faith"--*irrespective* of whether or not the conduct takes place before the court.

[6] Respondents' conscious knowledge that the record does not support the lower court decisions may be assessed against the meticulous documentary presentation set forth in the first 40 pages of Petitioners' appellate brief to the Circuit Court, filed December 10, 1991, as well as in their Petition for Rehearing, filed August 27, 1992. For the convenience of the Court, an illustrative excerpt of the Petition for Rehearing is annexed hereto. A full copy of the Petition for Rehearing is already on file with this Court as Exhibit "C" to Petitioners' December 2, 1992 motion to extend their time to file their "Cert" Petition.

such motions were unsupported or that they were in any way untruthful or made in bad faith. And they do not address Petitioners' due process right to make bias recusal motions--without retaliation by way of sanctions under the court's inherent power (Pet., at 22).

Finally, Respondents have not denied that the sua sponte inclusion in the decisions of both the District Court and Second Circuit opinions of dehors-the-record false and defamatory material, based on unadulterated hearsay, was totally violative of due process and the Code of Judicial Conduct (Pet., at 8, 10-11, fn. 8).

Respondents Do Not Deny That Equitable Considerations Bar Their Sanction Award Under Inherent Power

A. Respondents Do Not Deny That The Sanctions Award Constitutes "Unjust Enrichment" And A "Windfall" To The Insured Defendants

Respondents do not address Petitioners' equitable arguments involving the insurance issue--an issue highlighted by Respondents' express admission that three of the four defense counsel were fully paid by State Farm Insurance Company[7] and that the insured defendants paid no legal expenses from their "own pocket" (fn. 6). Respondents thus concede Petitioners' contention that State Farm is the "real party in interest" for any claims based on reimbursement of attorneys' fees and expenses (Pet., at 25).

Respondents totally ignore--just as they did before the lower courts--the threshold issue raised by Petitioners from the outset that the sanction awards are jurisdictionally deficient under FRCP 17(a) and 19 (Pet., at 27).

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[7] With respect to defense counsel for Hale Apartments, who purports that it was "not covered by insurance", Petitioners were denied discovery on that issue. As shown by Petitioners' Rule 60(b)(3) motion (Aff. B), defense counsel for Hale Apartments repeatedly misrepresented and concealed throughout the discovery process material information concerning, inter alia, the corporate status of Hale Apartments. As a result, the District Court erroneously granted summary judgment to Hale Apartments based on a false premise that such entity was a corporation, whose "veil" could not be "pierced" to charge it with the acts and omissions of its board representative, defendant Robert Rifkin (Aff B: 5-8)

Most significantly, Respondents do not deny that following the Second Circuit's affirmance of the District Court's $100,000 sanction award, defense counsel refused to turn over to the insurer the monies ordered to be paid by Petitioners (Pet., 13; CA-30)[8]. Respondents thus confirm that they believe themselves entitled to the benefit of a "windfall" award--notwithstanding case law of this Court and the Second Circuit proscribing "windfall" awards.

B. ***Respondents Do Not Deny That Their Uncontroverted Litigation Misconduct Constitutes "Unclean Hands" Disentitling Them To Sanctions And Entitling Petitioners To Affirmative Relief***

The most "extraordinary" aspect of Respondents' Opposing Brief is its failure to deny Petitioners' numerous allegations of litigation misconduct, including fraud upon the court and Petitioners (Pet., at 4-6, 24-28). Nor have they denied the fact that Petitioners' fully-documented motion for sanctions and Rule 60(b)(3) relief was uncontroverted by Respondents (Pet., at 6, 25-28)[9].

Respondents themselves identify the fact that Petitioners supported such motion, which was also in opposition to Respondents' then pending counsel fee/sanction motions, with:

> "...five separate affirmations, a supporting memorandum of law, which supplemented...[a] memorandum of law previously filed, and three separate compendia of exhibits." (at p. 5)

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[8] Petitioners' motion to the Second Court to expand the appellate record so as to include this further proof that Respondents' fee applications were not made on behalf of the insurer as the "real party in interest" was summarily denied (Pet., at 13; CA-26). It may be noted that in Pacific Legal a similar motion was made to the Ninth Circuit to correct critical factual errors as to the relationship between Pacific Legal Foundation and the plaintiffs in that case, on which the Ninth Circuit's decision rested. The Ninth Circuit also rejected such motion (Petition of Pacific Legal, p. 6, at fn.1.)

[9] For that matter, Respondents have also not denied that Petitioners' timely-filed Objections to the closing of discovery were uncontroverted by them. (Pet., at 5)

Respondents do not deny Petitioners' statements as to the serious discovery misconduct committed by Respondents, which was wilful and on-going and included the deliberate destruction and suppression of evidence critical to proving Petitioners' discrimination case (Pet., at 4-5, 27-28).

Nor do Respondents deny that such misconduct as formed the basis of Petitioners' extensively documented Rule 60(b)(3) motion substantially interfered with and prejudiced Petitioners in proving their affirmative case (Pet., at 27-28).

Respondents' admission of "unclean hands" by reason of their failure to deny their litigation misconduct before the District Court, the Circuit Court, or in their Opposing Brief before this Court warrants summary reversal of the sanctions award in their favor, as well as summary reversal of the denial of Petitioners' Rule 60(b)(3)/sanctions motion.

This Case Mandates Exercise Of The Court's Power of Supervision

As set forth in the Petition (at 19, 28), the Second Circuit, by its decision, has:

> "so far departed from the accepted and usual course of judicial proceedings [and has] ...sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." (Rule 10.1(a)).

In tone, content, and disposition, the decision sought to be reviewed fits within the aforesaid narrow category requiring this Court to protect not only the integrity of the courts, but of our Constitution, and citizens claiming their due process and equal protection rights thereunder.

Moreover, since Petitioners made a specific motion under Rule 60(b)(3) based upon Respondents' fraud, Petitioners respectfully request that this Court, in the exercise of its inherent power to protect the integrity of the judicial process and to safeguard the public, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944), conduct the "independent investigation" authorized by Universal Oil

Products Co. v. Root Refining Co., 382 U.S. 575, 580 (1946), quoted approvingly in Chambers, supra, at 2132, by its own review of Petitioners' aforesaid Rule 60(b)(3) motion.

Such uncontroverted motion is dispositive of every issue before this Court, including Petitioners' right to summary reversal of the Judgment.

Conclusion

The Petition for a Writ of Certiorari should be granted and the Judgment below summarily vacated as a nullity and the decision of the Second Circuit summarily reversed in all respects. Sanctions and new trial relief under Rule 60(b)(3) should be awarded to Petitioners as a matter of law.

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April 12, 1993

SUPPLEMENTAL APPENDIX

EXCERPT FROM PETITIONERS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC, FILED AUGUST 27, 1992 (pp. 10-11)

"The extent to which the District Judge did not meet the standards required for an award under inherent authority is highlighted by the only instances in his Opinion as showing Plaintiffs' alleged bad-faith, cited in the context of §1927 sanctions (at A-14-7).

Because the [Second Circuit's] Decision repeats these instances (at 6391-2) to support fee-shifting for the totality of the litigation, rather than specific conduct to be sanctioned under §1927, they are herein set forth to demonstrate their inaptness for sanctions under any theory:

> (a) "plaintiffs 'attempted to communicate directly with the defendants'" (at 6391): The record shows (AA-47) that the letter to Defendants was not sent by either Elena Sassower or Doris Sassower, but by John McFadden, the former co-Plaintiff and seller of the subject apartment for the stated purpose of effectuating a settlement.
>
> > [fn. #5 hereto: In fact, the District Judge's Opinion acknowledges Mr. McFadden's authorship of the letter to Defendants--the "impropriety" of which it acknowledged "can be overlooked" (A-32).]
>
> (b) "the Magistrate...had recommended dismissal of the complaint because of Doris Sassower..." (at 6391-2): The record shows (see discussion and record references cited in Br. 33-39) that the Magistrate's recommendation and the District Judge's Opinion based thereon were factually unjustified, rendered without due process, and even without a formal motion for Rule 37 sanctions ever made by defense counsel. The lack of due process precludes its use as a basis for a "bad faith" finding against her, a fact recognized by Chambers v. Nasco:

> "A court must...comply with the mandates of due process...in determining that the requisite bad faith exists..., see Roadway Express, supra, at 767, 100 S.Ct. at 2464." Chambers at 2136

(c) Doris Sassower's "role in assisting another attorney " 'in conducting incredibly harassing depositions'", and "'particularly shocking and abusive questioning'" (at 6392): Examination of the transcript shows this statement to be factually false (Br. 39-40), the questions were not improper, and Doris Sassower's entire participation consisted of two wholly innocuous one-line comments: (1) "She doesn't know when she was born." (AA-48); and (2) "Are you serious?" (AA-59).

As a matter of law, the foregoing three instances do not show bad faith to constitute a basis for §1927 sanctions, which is the context in which they were cited by the District Judge, nor do they constitute a basis upon which the Panel could activate the District Judge's inherent power against either Plaintiff, Roadway Express, Inc., at 2465. Indeed, as this Court recognized in Dow Chemical Pacific, at 345, such isolated instances, even were they legitimate, are too inconsequential to sustain an award representing the totality of three year's litigation costs.

Since the District Judge cited no other specific instances of alleged "bad faith", the exception to the "American Rule" cannot be sustained on the basis of his Opinion--and the Panel cited no basis in the record. Indeed, the Decision does not cite the record once."